STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2011
v	No. 297755 Ingham Circuit Court
ANTONIO MARCUS VASQUEZ, Defendant-Appellant.	LC No. 09-001162-FC

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendant Antonio Marcus Vasquez appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83, felony firearm, MCL 750.227b, and intentionally discharging a firearm at a dwelling, MCL 750.234b. The trial court sentenced defendant to seven to 15 years in prison for the assault, two years in prison for felony firearm, and six months in jail for the discharge of a firearm at a dwelling. We affirm.

I. FACTS

This case arises out of an August 24, 2009, shooting in Lansing, Michigan. The jury convicted defendant of shooting through the home of Ixchel Esquivel.

Esquivel testified that on August 21, 2009, she asked her 17-year-old twin nephews, Arron and Alberto Rodriguez, and some of their friends to work at her house. While Alberto was mowing her lawn, Esquivel looked outside and saw him gesturing. She went outside and saw two young men on the sidewalk. They were screaming profanities at Alberto and "trying to get him to come out of the yard." Esquivel told them to leave. She identified the two young men as Rasheed Jones and Lorenzo. [She did not know Lorenzo's last name.]

Later the same day, while Alberto was still mowing the lawn, Esquivel saw Jones and Lorenzo ducking between cars in her driveway, apparently trying to sneak into her yard. She immediately ran outside. There were a few other people with Jones and Lorenzo, including defendant. [Esquivel did not know defendant before this incident, but she later learned his name and was able to identify him by sight.] They were "trying to get at" Alberto. Arron came outside and "everybody clashed at the front yard." Esquivel pleaded with defendant and those with him to leave. A verbal confrontation between the two groups continued for five to eight minutes. Esquivel heard sirens, and defendant and those with him ran away.

On August 24, when Esquivel was driving home with her son, Arron, and two other boys, she saw Jones, Lorenzo, and defendant on the porch of a house. She made eye contact with defendant. When she arrived at home with the four boys, Esquivel looked outside and saw Jones, Lorenzo, and defendant in the street, walking past her house. Shortly thereafter, when she and the boys were preparing to leave the house, she went out the front door of the house—the door that leads from the living room to the enclosed front porch—and put her key in the lock. She was standing in that doorway. Three of the boys were still inside the house, and Arron walked past Esquivel onto the porch. He started to open the door leading from the porch to the outside. The porch door is directly aligned with the front door of the house. He opened the porch door two to two and a half feet. Esquivel then heard a popping sound. She recalled hearing four pops that were close together. The window on the porch door shattered. Esquivel looked outside and saw Jones, Lorenzo, and defendant on the sidewalk. Defendant had a gun and fired it toward the house. Jones also had a gun. When the shooting started, Arron hid between the porch door and one of the porch windows. After the shooting, Jones, Lorenzo, and defendant ran. Alberto was not at the house on the day of the shooting.[1]

Arron testified that on August 24, when he was preparing to leave Esquivel's house, he walked onto the front porch. He started to open the porch door to go outside. When he had opened the door ten to 12 inches, he heard a loud pop. He heard a total of four or five popping noises. He closed his eyes and jumped to the floor. Arron believed that the window in the porch door and the window to the left of the door shattered. The window in the door was large. The bottom of the window fell below his waist.

Officer Darren Blount testified that in the early afternoon of August 24, he was dispatched to Esquivel's house. Dispatch advised that three men had just shot into the house. As he approached the house, Officer Blount saw a male matching the description of one of the suspects. The officer recognized him as Lorenzo Moore, Jr. Officer Blount advised Moore to stop, but Moore ran out of sight. When Officer Blount arrived at the house, Esquivel was upset, crying, and shaken. Arron also appeared shaken. When the officer questioned Esquivel, she said that she saw defendant and Jones holding guns. Officer Blount testified that he was familiar with both defendant and Jones, and that "usually they're together," along with Moore. The officer found two shell casings in the front yard of the house near the driveway and a bullet on the windowsill of the middle window leading from the living room to the front porch.

Perez testified about the condition of the house after the shooting. The window in the porch door was completely shattered and there were bullet holes in two of the windows leading from the living room to the porch. There was also a hole in one of the interior walls in the living

[1] Karmondi Perez testified that she owned the house where Esquivel resided. Perez took measurements of the house after the shooting. The main floor of the house sits approximately two feet off of the ground, and there is a three-step staircase leading up to the porch door. There are four porch windows across the front of the porch and three windows leading from the living room to the porch. From the front door of the house to the porch door is approximately six feet, and from the porch door to the sidewalk is approximately 15 feet.

room, approximately seven feet above the floor. She found a bullet in the hole and gave it to the police. The distance between the porch door and the interior wall where Perez found the bullet is approximately 20 feet.

II. DEFENDANT'S MOTION FOR A DIRECTED VERDICT

Defendant argues that the trial court erred in denying his motion for a directed verdict. We disagree.

At trial, after the prosecution rested, defendant moved for a directed verdict as to the assault with intent to commit murder charge, arguing that there was insufficient evidence of an attempt to murder. In denying the motion, the trial court expressed concern that the prosecution had not established intent to commit murder and stated that it was not a strong case. The court noted that all of the shots were fired in the same direction, which was near Arron, but not directly at him. On the other hand, the court noted that four shots, which was a significant number of shots, were fired in Arron's general direction, and under the Supreme Court's holding in *People v Taylor*, 422 Mich 554; 375 NW2d 1 (1985), such evidence was sufficient to present the question of intent to the factfinder. The court held that in this case, there was sufficient evidence for the jury to conclude that defendant committed assault with intent to commit murder. The court later stated that this was "not the most powerful case [he] ever heard," but the "standard is whether or not the jury could find, based on the evidence which must be considered, in a light most favorable to the People, that the elements of the offense . . . have been established. I think they can do that, given the proximity of the shots to the gentlemen opening the door, and the entire circumstance."

On appeal, defendant argues that the evidence was insufficient to establish, beyond a reasonable doubt, intent to kill under circumstances that would have made the killing murder. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001). Determining the weight of the evidence and the credibility of witnesses are generally roles for the jury. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

"The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996) (quotation marks and citation omitted). Stated differently, "in a prosecution for an assault with intent to murder, the actual intention to kill must be found, and that under circumstances which would make the killing murder." *People v Fyda*, 288 Mich App 446, 454; 793 NW2d 712 (2010), quoting *Maher v People*, 10 Mich 212, 217 (1862), overruled in part on other grounds *People v Woods*, 416 Mich 581; 331 NW2d 707 (1982). This Court has clarified that "[s]pecific intent to kill is the only form of malice which supports the conviction of assault with intent to commit murder. Intent to inflict great bodily harm or wanton and willful disregard of the recklessness of one's conduct is insufficient . . . ."

Id., quoting *People v Cochran*, 155 Mich App 191, 193-194; 399 NW2d 44 (1986). "[I]f a defendant would have been guilty of manslaughter had the assault resulted in death (due to an absence of malice), there can be no conviction of assault with intent to murder." *Id*., quoting *People v Lipps*, 167 Mich App 99, 106; 421 NW2d 586 (1988).

Our Supreme Court, however, has emphasized that a jury may "draw reasonable inferences to assist in making the finding of an actual intention to kill." *Taylor*, 422 Mich at 554.

> By saying, however, that the specific intent to murder . . . must be proved, we do not intend to say it must be proved by direct, positive, or independent evidence; . . . the jury "may draw the inference, as they draw all other inferences, from any facts in evidence which to their minds fairly prove its existence." And in considering the question they may, and should take into consideration the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made. [*Id*. at 567-568, quoting *Roberts v People*, 19 Mich 401, 415-416 (1870).]

In *Taylor*, the case cited by the trial court, defendant Ronald G. Taylor fired a "large number of shots" at the home of a family. *Id*. at 563. A daughter was killed, the mother and two other children were wounded, and the father and a fourth child were present, but not wounded. *Id*. Following a bench trial, the defendant was convicted of second-degree murder and five counts of assault with intent to commit murder, among other offenses. *Id*. The trial court found that after "being involved in a melee" at the family's home, the defendant left, obtained a rifle or rifles and ammunition, and returned to the home. *Id*. at 564. The defendant knew at least some of the family was in the living room. *Id*. He positioned himself approximately 70 yards away and fired at the home. *Id*. At least seven shots entered the home. *Id*. The court held that the defendant "knew he was creating an extremely high degree of risk of death or serious bodily harm to the occupants of the home and he had the specific intent to create such a risk." *Id*. He fired "with malice, in that he intentionally, knowingly, willfully, and wantonly committed acts, the natural tendency of which was to cause death or serious bodily harm with knowing and intentional disregard of the consequences of such acts." *Id*. at 564-565. Later, the defendant positioned himself with a view of the rear of the home and fired more shots. *Id*. at 565. At least two of the shots entered the home, which at that time was unoccupied. *Id*. The court held that in firing those shots, the defendant "evidenced the same intent and state of mind as . . . he was possessed of when he fired . . . in the front of the home." *Id*. The Court of Appeals affirmed. *Id*. at 566.

The Supreme Court noted that in order to convict a defendant of assault with intent to commit murder, "it is necessary to find that there was an actual intent to kill." *Id*. at 567. The prosecution argued that the trial judge did, in effect, find an actual intent to kill. *Id*. at 568. But the Supreme Court disagreed, stating that it could not locate in the trial court's findings the requisite language concerning an intent to kill. *Id*. The Court held that the error could not "be said to be harmless," since the circumstances of the case were "equally suggestive of a lesser intent." *Id*. at 568-569. The Court remanded the case to the trial court "for entry of a judgment

of guilty of assault with intent to do great bodily harm less than murder, and for resentencing." *Id*. at 569. The Court further stated, however, that if "the prosecuting attorney is persuaded that the ends of justice would be better served, on notification of the trial court before resentencing, the trial court shall vacate the judgment of conviction and grant a new trial on the charge that the defendant committed the crime of assault with intent to murder." *Id*.

In *People v Beard*, 171 Mich App 538, 540; 431 NW2d 232 (1988), the defendant was convicted, following a bench trial, of ten counts of the common-law offense of being an accessory after the fact and one count of felony firearm. These convictions arose out of the defendant's role in a shooting in a crowded McDonald's restaurant by his companion, Gregory Allen. *Id*. at 540-541. The defendant was initially charged with ten counts of assault with intent to commit murder premised upon an aiding and abetting theory. *Id*. at 541. On appeal, the defendant argued that the trial court erred by denying his motion for a directed verdict on those charges. *Id*. "Acknowledging that the motion presented a close question, the trial court nevertheless denied the motion, apparently concluding that the prosecutor had satisfied his burden with inferences drawn from circumstantial evidence." *Id*. This Court affirmed the trial court, stating:

> Here the evidence, viewed in a light favorable to the prosecutor, showed that a brown Buick automobile operated by defendant and occupied by Gregory Allen swerved at a group of pedestrians, one of whom responded by apparently firing a gun at the car. Defendant and Allen drove away, and Allen obtained a shotgun at defendant's residence. Later defendant and Allen arrived at the restaurant, and defendant confronted the person that he believed to be responsible for the earlier shooting. A fight broke out. Someone was observed leaving the restaurant and approaching the car driven by defendant. Allen entered the restaurant with the gun and discharged it several times, hitting several of the bystanders. *This evidence was sufficient to show the commission of assault with intent to commit murder*. After the shooting, defendant and Allen drove to the residence of defendant's brother's girlfriend (not the location where the gun was obtained), and left the gun there. Defendant, Allen, and a third person were apprehended later that day in the same automobile. Defendant fled, but one of the officers identified defendant as the driver. We find this evidence sufficient to defeat a motion for a directed verdict on the offenses of aiding and abetting an assault with the intent to murder. *From this evidence, the finder of fact could have inferred that defendant had the requisite intent at the time of the shooting and that his actions in concert with Allen assisted the commission of the crime.* [*Id*. at 542 (emphasis added).][2]

[2] There are a number of unpublished cases, which although non-binding, are analogous to this case and helpful to our analysis. See, e.g., *People v Ambers*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2008 (Docket No. 277022); *People v Robinson*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2007 (Docket No. 270687).

Although we agree with the trial court that this case presents a close question, the court did not err in denying defendant's motion for a directed verdict. The circumstantial evidence, viewed in the light most favorable to the prosecution, "could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *Aldrich*, 246 Mich App at 122-123. Specifically, we hold, as did the trial court, that there was sufficient evidence for a reasonable juror to find the requisite actual intent to kill.

The evidence established that Esquivel, Arron, Alberto, and their friends had a series of conflicts with Jones, Lorenzo, and defendant before the shooting. Jones, Lorenzo, and defendant were known to spend time together. Alberto testified that he had "previous altercations" with Lorenzo, which occurred in May 2009. On August 21, 2009, three days before the shooting, while Alberto was mowing Esquivel's lawn, Jones and Lorenzo screamed profanities at him and tried "to get him to come out of the yard." Esquivel told them to leave, and when they yelled profanities at her, she told them she would call the police to make them leave. Later the same day, while Alberto was still mowing the lawn, Jones, Lorenzo, and defendant returned to the house and were "trying to get at" Alberto. There was a verbal confrontation between defendant and those with him and Esquivel, Alberto, Arron, and their friends. Defendant and those with him were "egging [them] on, trying to . . . get [them] to go after them." Esquivel stood between the two groups during the confrontation. She got within two feet of defendant and told him to "get the fuck out of [her] yard." Defendant yelled profanities and insults back at her. Defendant and those with him eventually ran away after they heard sirens.

On August 24, 2009, the day of the shooting, Esquivel saw Jones, Lorenzo, and defendant on the porch of a house when she was driving home with Arron, her son, and two other boys. She made eye contact with defendant. When she arrived at home with the four boys, Esquivel saw Jones, Lorenzo, and defendant in the street, walking past her house. Shortly thereafter, just before the shooting, Esquivel put her key in the front door of the house, preparing to leave. She was standing in the doorway leading from the living room to the enclosed front porch. Arron walked past her onto the porch, and the three other boys remained inside the house. At least two of them were in the living room. Arron then started opening the porch door. At that point, there were four or five gunshots in close succession. When the shooting started, Arron got down and hid beside the door. Esquivel, who was still in the doorway, saw Jones, Lorenzo, and defendant on the sidewalk. Defendant had a gun and fired it toward the house. After the shooting, Jones, Lorenzo, and defendant ran.

The prosecution asserted that when Arron was opening the porch door, defendant may have believed Arron was his twin brother Alberto. The prosecution stated during closing arguments: "You saw them both here. Their physical appearances, I would suggest to you, are very similar, and it would certainly be easy for someone to mistake them—mistake Arron for Alberto as he was about to leave the door."

Arron believed that both the window in the porch door and the window to the left of the door shattered, but the evidence established that only the window in the porch door shattered. There were also bullet holes in two of the windows leading from the living room to the porch. Officer Blount found two shell casings in the front yard of the house and a bullet on the windowsill of the middle window leading from the living room to the porch. There was also a

hole in one of the interior walls in the living room, approximately seven feet above the floor. There was a bullet in the hole.

Considering the evidence, a reasonable juror could have inferred that defendant was aware that there were multiple people inside Esquivel's house at the time of the shooting. Just before the shooting, Esquivel and the four boys drove by defendant. He made eye contact with Esquivel. When they arrived at Esquivel's house, defendant walked by with Jones and Lorenzo. Shortly thereafter, at the time of the shooting, three of the boys were inside the house and Arron was standing on the front porch opening the porch door. The window in the door was large, with the bottom of the window falling below Arron's waist, and he had opened the door anywhere from ten to 30 inches. Thus, it is reasonable to conclude that defendant, who was standing on the sidewalk approximately 15 feet from the porch door, could clearly see Arron. It is also likely that he could see Esquivel who was standing approximately six feet behind Arron in the doorway to the living room.

Defendant's use of a deadly weapon and the damage caused by the shooting is also significant. Esquivel observed defendant on the sidewalk holding a gun and firing toward the house. Jones was also holding a gun. There were four or five shots fired total. No one was injured as a result of the shooting, and the fact that there were bullet holes in the windows beside Esquivel and in the living room wall approximately seven feet above the ground indicates that at least some of the bullets traveled in an upwardly direction beside Arron and Esquivel. Nonetheless, while all of the bullets missed the occupants of the house, defendant fired up to five shots at the house, standing only 15 feet from the porch, and the glass in the porch door that Arron was opening completely shattered. A reasonable juror could infer, based on this evidence, that at least one bullet hit the window in the porch door while Arron was opening it and that defendant intended to kill Arron.

Considering the evidence in the light most favorable to the prosecution, particularly the history of conflict between defendant and Alberto, Arron, their friends, and Esquivel, the likelihood that defendant could clearly see Arron behind the porch door and was aware of the other occupants' presence in the house, that defendant used a deadly weapon to fire up to five shots at the house from only 15 feet away, and that the window directly in front of Arron completely shattered, a reasonable juror could have concluded that defendant possessed an actual intent to kill at the time of the shooting. Accordingly, we affirm the trial court's denial of defendant's motion for a directed verdict.

III. JURY INSTRUCTIONS

Defendant next argues that the trial court committed reversible error in failing to properly instruct the jury on the intent element of assault with intent to commit murder. We disagree.

Defendant did not object to the trial court's instruction below on the same ground that he now raises on appeal.[3] We review unpreserved claims of instructional error for plain error affecting the defendant's substantial rights, "i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). Reversal is warranted only if the error "resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings." *Carines*, 460 Mich at 763 (quotation marks and citation omitted).

We review jury instructions as a whole to determine if there is error requiring reversal. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Jury instructions must include all elements of the charged crimes and must not exclude material issues, defenses, and theories if the evidence supports them. *Id*. Even if jury instructions "are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Aldrich*, 246 Mich App at 124. The defendant bears the burden of establishing error requiring reversal. *People v Bartlett*, 231 Mich App 139, 144; 585 NW2d 341 (1998).

As indicated, "[t]he elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *Davis*, 216 Mich App at 53. The standard jury instruction for assault with intent to commit murder states:

> (1) The defendant is charged with the crime of assault with intent to murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (2) First, that the defendant tried to physically injure another person.
>
> (3) Second, that when the defendant committed the assault, [he/she] had the ability to cause an injury, or at least believed that [he/she] had the ability.
>
> (4) Third, that the defendant intended to kill the person [he/she] assaulted [, and the circumstances did not legally excuse or reduce the crime]. [CJI2d 17.3.]

Here, the trial court instructed the jury in accordance with CJI2d 17.3, but did not read the bracketed portion of CJI2d 17.3(4). The court then instructed the jury on the lesser offense of assault with intent to do great bodily harm less than murder.

[3] At trial, defendant objected to the instruction only on the basis that he believed no instruction on assault with intent to commit murder should be given because there was insufficient evidence to establish the requisite intent.

On appeal, defendant argues that the trial court erred in failing to instruct the jury on the third element of assault with intent to commit murder, i.e., assault "which, if successful, would make the killing murder." See *Davis*, 216 Mich App at 53. But the standard jury instruction for assault with intent to commit murder does not include the particular language cited by defendant, and this Court has held that the standard instruction adequately apprises the jury of the elements of the offense. See *People v Lipps*, 167 Mich App 99, 106; 421 NW2d 586 (1988), and *People v Haggart*, 142 Mich App 330, 341-342 and n 1; 370 NW2d 345 (1985), wherein this Court approved the use of CJI 17:2:01, now CJI2d 17.3. In *Haggart*, this Court explained the importance of the phrase, "intended to kill," stating:

> To support a conviction of assault with intent to commit murder the actual intent to kill must be proven beyond a reasonable doubt.
>
> Murder requires a killing. It follows, therefore, that one who "intends to murder" intends to kill. One can murder someone without possessing the specific intent to kill; however, the same is not true with respect to the offense of assault with intent to commit murder. The distinction between the two offenses was set forth early on in this jurisdiction in *Roberts v People*, 19 Mich 401, 415 (1870), as follows:
>
> > "This case, so far as regards the intention to kill, is not identical with that of murder. To find the defendant guilty of the whole charge, it is true, the jury must find the intent to kill under circumstances which would have made the killing murder—and it is not denied that had death ensued in the present case, it would have been murder. But the converse of the proposition does not necessarily follow; that, because the killing would have been murder, therefore there must have been an intention to kill. Murder may be and often is committed without any specific or actual intention to kill. . . . And no such specific intent is therefore necessary to be found. This difference was recognized in *Maher v The People*, [10 Mich 212 (1862)] above cited." [*Haggart*, 142 Mich App at 340-341.]

The *Haggart* Court further stated that although the trial court's instruction in that case adequately apprised the jury of its duty "to find defendant guilty of assault with intent to commit murder if it found that defendant intended to murder (i.e., kill)" the victim, "a much better and more precise instruction for assault with intent to commit murder" is the standard jury instruction, then CJI 17:2:01, because it highlights "that the intent required for this offense is one 'to kill.'" *Id*. at 341-342 and n 1.

Defendant further argues that the trial court should have used the phrase, "the circumstances did not legally excuse or reduce the crime," in its instruction. That phrase is the bracketed portion of CJI2d 17.3(4). The brackets denote that the language is not always applicable, and the use note accompanying the instruction states: "*Where appropriate*, give special instructions on particular defenses (see chapter 7), on mitigation (CJI2d 17.4), and transferred intent (CJI2d 17.17)" (emphasis added). Defendant admits that he did not assert any

circumstance that would legally excuse the crime or request any affirmative defenses. Rather, defense counsel argued only that there was insufficient evidence to find an actual intent to kill. Based on the defense presented, the trial court instructed the jury on the lesser offense of assault with intent to do great bodily harm less than murder.

Reviewing the instructions as a whole, we conclude that they fairly presented the issues to be tried to the jury and sufficiently protected defendant's rights. Even if the bracketed portion of CJI2d 17.3(4) was applicable to this case based on defendant's assertion that had the shooting resulted in a death, the crime might have been reduced to assault with intent to commit great bodily harm less than murder or manslaughter, the jury was fully apprised of the defense argument that defendant lacked the requisite intent to be guilty of assault with intent to commit murder. The trial court instructed the jury on assault with intent to commit great bodily harm less than murder, and it would not have been appropriate to instruct on manslaughter considering that the shooting did not result in death. No error results from the omission of an instruction if the instructions as a whole cover the substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997). Accordingly, we hold that defendant has failed to establish plain error affecting his substantial rights.

IV. DEFENDANT'S MOTION TO STRIKE ALBERTO AS A WITNESS

Finally, defendant argues that the trial court abused its discretion in denying his motion in limine to strike Alberto as a witness. Again, we disagree.

Defendant filed a pre-trial motion in limine to strike Alberto as a witness. The trial court heard and denied the motion on the first day of trial. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). Reversal is not required for a preserved, nonconstitutional error unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant argues that Alberto's testimony should have been excluded because it was irrelevant. Alberto was not present for the shooting and, according to defendant, Alberto's testimony about his confrontation with Jones, Lorenzo, and defendant three days before the shooting was of no consequence to this action. Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

The trial court held that Alberto's testimony about the events that occurred on August 21, 2009, three days before the shooting, was relevant for at least two reasons, and we agree. First, the identity of the shooter was contested at trial. Defense counsel argued that defendant was not present for the shooting, presenting an alibi witness in support of that argument. Further, Esquivel, the only witness who testified to seeing defendant shooting at the house, admitted that she had never seen him before their confrontation on August 21. Alberto's testimony that

defendant came to Esquivel's house and engaged in a verbal confrontation with her on August 21 supported Esquivel's testimony that she was able to identify defendant as the shooter.

Second, Alberto's testimony was relevant to establishing a motive for the shooting. Motive is relevant to proving the identity of the perpetrator of a crime, actus reus, and mens rea. *People v Sabin*, 463 Mich 43, 68; 614 NW2d 888 (2000). Alberto testified that he saw defendant's friends Lorenzo and Jones in front of Esquivel's house earlier in the day on August 21. Later the same day, Lorenzo and Jones appeared again, along with defendant. There was a verbal confrontation between defendant and those with him and Esquivel, Alberto, Arron, and their friends. They yelled at each other in a manner that was "not friendly," and according to Alberto, defendant and his friends were "egging [them] on, trying to . . . get [them] to go after them." Esquivel stood between the two groups during the confrontation. She testified that three days later, at the time of the shooting, she saw defendant in front of her house with the same two friends, Lorenzo and Jones. The history of conflict between defendant and his friends and Alberto, Arron, their friends, and Esquivel was relevant to establishing a motive for defendant to shoot at Esquivel's house. The prosecution asserted that defendant intended to kill Arron, who was standing behind the porch door at the time of the shooting, and that defendant may have believed Arron was his twin brother Alberto because they looked alike. Alberto's testimony was relevant to establishing both identity and motive.

Defendant further argues that Alberto's testimony should have been excluded because it was unfairly prejudicial. MRE 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" All relevant evidence is inherently prejudicial to some extent, and it is only unfairly prejudicial evidence that may warrant exclusion. *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994). "'This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock.'" *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995) (citation omitted). The probative value of Alberto's testimony was not substantially outweighed by the danger of unfair prejudice. As indicated, the testimony was relevant to corroborating Esquivel's identification of defendant and establishing a motive for the shooting. The prosecution did not, by presenting this evidence, inject considerations extraneous to the merits of the action. Accordingly, we hold that the trial court did not abuse its discretion in denying defendant's motion in limine and admitting the evidence.

Furthermore, even if the trial court had abused its discretion, defendant cannot establish that the admission of the evidence more probably than not affected the outcome of the case. Alberto's testimony about the events that occurred three days before the shooting was almost entirely cumulative of Esquivel's testimony about the same events. Therefore, reversal is not warranted. See *Lukity*, 460 Mich at 495-496.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Jane M. Beckering